IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THOMAS R. MARSHALL, as Governor of the State of Indiana, et al.,
Plaintiffs in Error,
v.
JOHN T. BYE,
Defendant in Error.

No. 401.
(22,455.)

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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No. 890.
(23,465.)

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The defendant in error has filed a brief directed to matters collateral to the main issue, and to such new matter we beg to reply, as follows:

It is asserted that this "is now a moot case and should be dismissed." (Brief for defendant in error, p. 11.) In support of this proposition three several grounds are stated.

First. That submission to the voters cannot be made, the general election of November, 1912, having passed.

Second. That the Act of 1913 for taking the opinion of the voters relative to calling a constitu-

tional convention operates to make this case a moot one.

Third. That the expiration of the terms of office of the plaintiffs in error, Marshall, Bachelder and Roemler, makes the case a moot one.

Of these in their order:

1.

In the brief heretofore filed for plaintiffs in error the rule relative to the time when the proposed question shall be submitted is stated. (Brief for plaintiffs in error, pp. 67-77.) The idea that the submission to the people of the proposition proposed could be forever prevented by continuing litigation past the general election of 1912 seems to be a new one. The judgment is against the defendants and "*their successor* and *successors* in office * * * are jointly and severally enjoined and restrained from causing a brief statement or any statement of or concerning the proposed new constitution * * * to be printed on the state ballot or ballots to be by them, or any of them, or their successor, or successors, distributed and used by the electors of the State of Indiana at the next general election * * * or any *other election to be held* in said *state*." (Record p. 57.)

The law of the State of Indiana is that:

> "Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered *directory* merely, unless the na-

ture of the act to be performed, or the language used by the legislature, show that the designation of the time was intended as a limitation of the power of the officer."

Wampler v. State, ex rel., 148 Ind. 557-568.

This rule as shown by the case cited applies to the facts involved in the case at bar, and answers the first reason stated by the defendant in error.

The authorities cited by defendant in error as supportive of this position are none of them in point. In Mills v. Green, 159 U. S. 651-657, it is said:

"The whole object of the bill was to secure a right to vote at the election to be held on the third Tuesday of August, 1895."

The principle is that:

"It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

Mills v. Green, *supra*.

The Court could not by its judgment enable a man to vote at an election which had passed, but the Court by its judgment in the case at bar can remove the obstacle which has temporarily prevented the plaintiffs in error from doing that which it is their duty to do.

2.

Neither is the case made a moot one by the Act of March 15, 1913. That was an act to provide for taking the sense of the qualified electors on a call for a constitutional convention. The question to be submitted is: "Are you in favor of a constitutional convention in the year 1915?" The answer is either "yes" or "no". It provides that the question shall be submitted at the regular election to be held in 1914. If this act repealed the Act of 1911 either in express terms or by necessary implication, the case would be governed by Pennsylvania v. Wheeling Bridge Co., 18 Howard 421, where a court decree, which declared a bridge over the Ohio River to be an obstruction to the free navigation of the river, was rendered ineffective by an act of Congress subsequently passed declaring in effect that such structure was not an obstruction to the said river.

The Act of 1913, however, does not in terms repeal or affect the Act of 1911. Neither does it do so by implication. The provisions of both acts could very properly have been included under a single title. There is no inconsistency between them.

Upon a subject of so much importance as a change in the fundamental law of the State it is more than appropriate that there should be an opportunity for latitude of expression by the people. The necessity for a new constitution seems to be now conceded. If that conservative form set out in Chapter 118 of the Acts of 1911 meets the approval of the majority of

the voters of the State, there is no reason why their vote should not give it vitality. It is a safe assumption that if this is done, the proposition to hold a constitutional convention will be defeated. The contest will be a fair one between those who are satisfied with the conventional form of constitution, and those persons who are desirous of conducting novel experiments in the science of republican government.

The draft contained in Chapter 118 of the Act of 1911 will, if adopted, make possible laws having for their end honest elections. It has been drawn with that purpose in view. It will also take from the courts the disgrace of participating in legislative gerrymandering, and it expressly provides that there shall never be any recall of judges. Those who have held political power through illegal votes; those who have profited and hope to profit by legislative gerrymander, and those who wish the opportunity of recalling judges who do not please them, of necessity favor a constitutional convention. The issue will be perfectly clear, and it is appropriate that it should be fought out by the people.

It is interesting to note at this place that some citizens and electors may not wish the cost and chance of a constitutional convention, in which event, if the decision of the Supreme Court in this case stands, any one of the many circuit or superior judges of the state can prevent the governor and the executive department from submitting and the peo-

ple from voting upon the calling of a constitutional convention in 1914, and therefore, according to the counsel of defendant in error, prevent it forever.

3.

The effect of the expiration of the terms of office of Governor Marshall, Bachelder and Roemler.

The judgment by its terms, as heretofore appears, extends to the plaintiffs in error and their successors, prohibiting them from preparing the ballots for the election of 1912, or for any other election.

While the suit was originally begun against the plaintiffs in error as officers of the State of Indiana, it was in effect a suit against the office and against the people of the state represented by the plaintiffs in error. It therefore is one of those proceedings which may be commenced with one set of officers and terminated with another set, the latter being bound by the judgment.

Thompson v. United States, 103 U. S. 480;
26 L. Ed. 521, and authorities cited.

The writ of error was sued out during the official term of Governor Marshall. That term has expired and Governor Ralston has succeeded to the office. The law relative to the substituting of the succeeding officer in such cases is stated by the Supreme Court of Ohio as follows:

> "The point is not well taken. The action in such cases is regarded as against the treasurer,

whoever he may be, and it may proceed through all its stages in all courts in the same manner in which it was commenced, or, if desired, the new treasurer may, on motion, be substituted in the place of the retiring one, and this is certainly the better practice. The treasurer in office should, as one of his official duties, take charge of and look after all actions against or in behalf of his office; but a failure to substitute the new treasurer does not have the effect to abate the action, nor cause its dismissal on motion."

Pittsburgh, Ft. W. & C. Ry. Co. v. Martin, County Treasurer (Ohio), 41 N. E. 690-693.

And by the Supreme Court of Kansas as follows:

"The defendant's right of recovery is also questioned upon the ground that at the time of the trial his term of office had expired. Where a public officer is involved in litigation in his official capacity, the expiration of his term does not require a substitution of his successor. The public is conceived as being the real litigant. Pittsburgh, Ft. W. & C. R. Co. v. Martin, 53 Ohio St. 386, 41 N. E. 690; Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317; Shull v. Gray County, 54 Kan. 101, 107, 37 Pac. 994."

Hines v. Stahl (Kan.) 20 L. R. A. (N. S.) 1118-1123.

There can be no objection to the substitution of the present officers for those against whom the action was brought, and leave to make such substitution will be asked, although it is not regarded as essential.

THE FEDERAL QUESTION.

It is contended that no Federal question was decided by the Supreme Court of Indiana. (Brief for defendant in error, p. 17.)

The counsel does not in his discussion touch the fundamental proposition in the case. The situation is this:

The judicial department of the state, acting through the highest court of the state, has enjoined the governor from carrying out the law. It has enjoined the executive department of the government from performing functions which are exclusively within its domain, and it has interfered with the legislature to prevent it from taking the sense of the people upon a matter relating to the organic law, and therefore has prevented the people from expressing their will as to such subject.

The finding of fact as to what the plaintiffs in error are threatening to do is that "each of said named defendants, as such election commissioners * * * will comply with and carry out the requirements of each and every statute of Indiana relative to the holding and conduct of said general election to be held in 1912 * * * and will do each and every act required to be done by them according to law to submit said act * * * to the electors of the State of Indiana and to all the legal voters of said state for their adoption or rejection at said election, unless enjoined from so doing; and that said defendant, Thomas R. Marshall, * * * unless enjoined

from so doing, will at the general election to be held in 1912 cause a brief statement of said act * * * to be printed on said ballot with the words 'yes' and 'no' under the same so that the electors may indicate their preference and vote for the adoption or rejection of the proposed constitution set forth in said act."

It is further found that neither of said defendants are "threatening to do any act or acts relative to the holding of said general election, or in the preparation of the ballots to be used at said election except such act or acts are required by the statute to be done by them." (Rec. p. 49.)

The governor, when confronted by the assertion of authority over him and the executive department by a co-ordinate department of the state government, could have disregarded the proceeding and ignored the attempted judgment and mandate. Such forcible action was entirely within the power of the chief executive. That he possessed the ability to exert sufficient force to maintain the integrity of his position makes his refusal to exercise it the more laudable. It was his desire not to take any action tending to assist in causing public distrust of either law or government. Force is in any case allowable only as a last resort—an alternative which cannot be avoided. The governor could maintain the integrity of the republican government of Indiana through force, but he believed that by invoking the aid of the Federal government under the guarantee of Article

4, Section 4 of the Constitution, the same end could be accomplished as by the strong arm and that without injury to institution or law.

This is what he is undertaking to do. Redress can can be adequately administered only through the judicial department of the Federal government, and therefore he brings this writ of error. The objection to the judgment brought here for review is not that the Indiana Supreme Court decided wrongly, although such is believed to be the fact, but that *it had no authority to decide at all.* The doctrine that Federal courts follow state decisions with regard to matters of state law is well understood, but to invoke that doctrine in this case is to beg the whole question.

The Indiana Supreme Court had no power to assume control of the executive department, to "order the Governor around," nor to nullify legislative direction as to political matter; and when it arrogates to itself such authority, it repudiates the form of government under which it exists—repudiates the limitations upon its authority which are fixed by the republican government adopted in Indiana. Citizens of the United States who are also citizens of Indiana, represented by officers duly chosen by them, are well within their right and within the law in appealing to the Federal government to make good its guarantee as contained in Article 4, Section 4 of the Constitution.

A court "cannot under the guise of asserting judicial power usurp merely administrative functions."

> Interstate Commission v. Illinois Central R. R. Co., 315 U. S. 452.

(2) It is further said that the "plaintiffs in error did not attempt to set up any federal question until after the issues were made, the trial had, the court had made and filed the special findings of fact and stated the conclusions of law thereon."

The exact question which is here urged was presented to the trial court by separate motions in arrest of judgment before any judgment whatever had been rendered.

In disposing of a similar objection this Court said:

> "While the constitutionality of the law was not specially set up and claimed before the trial in the circuit court, there was a motion made in arrest of judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the 14th Amendment to the Constitution. The motion was denied, although the supreme court did not in terms pass upon the Federal constitutionality of the law. But this was a sufficient presentation of the Federal question."
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> Consolidated Coal Co. of St. Louis v. People of the State of Illinois, 185 U. S. 203-206; 46 L. Ed. 875.

(3) The third proposition of defendant in error stated on page 17 of their brief is that the plaintiffs

in error, being state officers, had no duty to perform under a void law, and so have no rights secured under the Federal Constitution to be violated. The cases of Smith, Auditor, v. The State, 191 U. S. 138 and Braxton, etc., v. The State, 208 U. S. 192, are cited and apparently relied upon to support this proposition.

The law under which the plaintiffs in error were proposing to act was not a void law. The action which they were proposing to take was imposed upon them by §6944 Burns 1908, which section is part of the general election law of the state, has been in force since May 10, 1889, and is of unquestioned validity. (Brief for plaintiffs in error, p. 52. See, also, special finding of fact, p. 49.)

The contention of the defendant in error has been that the Act of 1911 was unconstitutional. This question has not been adjudicated for the reason that the Supreme Court had no power to adjudicate it, as is we think satisfactorily shown by Judge Morris' dissenting opinion. To treat that act as void is to evade the point in issue. It is perfectly well settled also that when the general assembly passes an act submitting the question to an electorate for final determination, the act is upon its passage, and is *in fieri* until it is voted upon and the result duly declared.

State v. Thorson, 68 N. W. 202;
People v. Mills, 70 Pac. 322;
Threadgill v. Cross, 26 Okla. 403, 109 Pac. 558;

Walton v. Develing, 61 Ill. 201;
State, ex rel., v. Winnette, 78 Neb. 379, 110 N. W. 1113.

It would be exactly as competent for the Supreme Court of Indiana to declare a bill for an act unconstitutional before it had been voted upon by either house of the General Assembly as to declare a proposition relating to elemental law unconstitutional before it has been submitted to the people, so that the proposition of defendant in error, so far as it includes the element of a void law, is without basis. So far as it contains an admission that officers having a duty to perform under a valid law have rights secured under the Federal Constitution which they may protect by litigation, it is correct.

There lies the distinction between defendant's claim and the cases which he cites. In Smith v. State, 191 U. S. 138, 148, the auditor refused to follow the command of the statute relative to certain mortgage exemptions, asserting that the statute was unconstitutional. The court held with great propriety that it did not lie with him to attack the constitutionality of the statute which in no wise affected him. The right to raise such questions rested, of course, with the persons injuriously affected thereby, who were not represented by the auditor. The same principle governed in the Braxton County case, 208 U. S. 192, but it is in no wise applicable to the facts presented in the case at bar.

Section 1 of Article 5 of the Constitution of Indi-

ana provides that "the executive powers of the state shall be vested in the governor." Section 16 of said Article further provides that "he (the governor) shall take care that the laws be faithfully executed." The constitution therefore conferred upon the governor the right, power and duty to see that the proposed new constitution was submitted to the voters of Indiana for adoption or rejection. The constitution having conferred the power and made it the duty of the governor to "take care that the laws be faithfully executed," it was his duty to take such steps in any proceeding instituted against him, either by appeal or writ of error, as are commensurate to the public trust and duties imposed upon him.

That he and his associates have authority to meet litigation and continue it to a final conclusion is essential to the continuance of government; otherwise, any kind of a judgment by any kind of a court in any kind of a case would result in permanently preventing the laws being enforced.

Norman v. Kentucky Bd. of Managers, 93 Ky. 537, 18 L. R. A. 556, 557;

Barbour on Parties in Law and Equity, p 106.

It is to be observed that defendant in error cites in this Court the overruled cases of

Governor v. Nelson, 6 Ind. 496;
Baker, Governor, v. Kirk, 33 Ind. 517;
Gray, Governor, v. State, 72 Ind. 567;
See, Hovey, Governor, v. State, 127 Ind. 528.

Respectfully submitted,

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